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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Jon S. Tigar, Judge

IN RE: CATHODE RAY TUBE (CRT) )  
ANTITRUST LITIGATION. )  
 ) NO. 07-05944 JST  
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San Francisco, California  
Thursday, May 30, 2019

**TRANSCRIPT OF PROCEEDINGS**

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Thursday - May 30, 2019

2:05 p.m.

P R O C E E D I N G S

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**THE CLERK:** Your Honor, now calling civil matter  
07-5944, Crago, Incorporated v. Chunghwa Picture Tubes Ltd.

If counsel could please come forward and state their  
appearances for the record.

**MR. SAVERI:** Good afternoon, Your Honor. May it  
please the Court, Rick Saveri on behalf of the Direct Purchaser  
plaintiffs.

**MR. RAPAWY:** Gregory Rapawy on behalf of the Direct  
Purchaser plaintiffs, Your Honor.

**MR. RUSHING:** Your Honor, Geoffrey Rushing on behalf  
of the Direct Purchasers.

**MR. ALIOTO:** Good afternoon, Your Honor. Mario Alioto  
on behalf of the Indirect Purchasers.

**MS. FU:** Good afternoon, Your Honor. Qianwei Fu from  
Zelle LLP on behalf of the Indirect Purchaser plaintiffs.

**MR. PLUNKETT:** Good afternoon, Your Honor.  
Stuart Plunkett on behalf of the Irico defendants.

**MR. TALADAY:** Your Honor, John Taladay on behalf of  
the Irico defendants.

**MR. JACOBMEYER:** Good afternoon, Your Honor. Brian  
Jacobsmeier on behalf of the Irico defendants.

**MS. YOUNG:** Good afternoon, Your Honor. Kaylee Young

1 from Baker Botts on behalf of the Irico defendants.

2 **MR. LEVIN:** And good afternoon, Your Honor. Nick  
3 Levin on behalf of the United States.

4 **THE COURT:** Very good. Welcome.

5 So I'd like to set some time limits. I'm not quite sure  
6 how to go about it. I think the arguments made by the Direct  
7 Purchasers and the Indirect Purchasers substantially overlap,  
8 as do the arguments made by the United States. So that's on  
9 the one hand.

10 On the other hand, I need to give the Irico defendants the  
11 opportunity to respond to all the arguments made by everybody.  
12 So if I were only concerned about the first -- if I were trying  
13 to balance all those things, what I might do is give each side  
14 30 minutes putting three different parties -- Indirect  
15 Purchasers, the Direct Purchasers, and the *amicus* -- on one  
16 side and the Irico defendants on the other, but I don't know if  
17 that works in injury to the plaintiffs because you probably  
18 just are going to need to have some amount of overlap.

19 So I'll set the minutes willy-nilly in just a moment if I  
20 don't hear a better suggestion, but does someone want to make a  
21 suggestion that I can adopt that gives everybody enough room to  
22 argue? You're the only thing on calendar this afternoon, which  
23 doesn't mean I want to here hours and hours of arguments, but  
24 it does mean we have a little more time than we might  
25 otherwise.

1           **MR. ALIOTO:** Your Honor, Mario Alioto.

2           We have met and conferred amongst the plaintiffs and tried  
3           to coordinate in advance of coming here today, and we're fine  
4           with ceding most of the time to the Direct Purchasers. We may  
5           need a little time at the end; but if that's any help,  
6           Your Honor, we're fine letting the Directs lead off and take  
7           the majority of the time on the plaintiffs' side.

8           **THE COURT:** All right.

9           **MR. SAVERI:** Yes, Your Honor, Rick Saveri on behalf of  
10          plaintiffs.

11          Mr. Rapawy from Kellogg Hansen is going to be handling the  
12          motion for the Direct Purchaser plaintiffs, and that would be  
13          our proposal, that he'll handle most of the issues; and then if  
14          the Indirects needed to pick up something, they'd pick that up.

15          **THE COURT:** All right.

16          Mr. Levin -- am I pronouncing that correctly?

17          **MR. LEVIN:** Yes, Your Honor.

18          **THE COURT:** Mr. Levin, how much time would you like?  
19          How much time do you need?

20          **MR. LEVIN:** I would say 10 minutes would be great.

21          **THE COURT:** Okay. What if I give the Direct  
22          Purchasers 20 minutes, I give the Indirect Purchasers 5 minutes  
23          to back cleanup, I give Mr. Levin the 10 minutes he wants, and  
24          I give the defendants 30 minutes? That's about an hour and 5  
25          minutes. It seems like that ought to work out.

1           **MR. RAPAWY:** That sounds fine with us, Your Honor.

2           **THE COURT:** Good. So ordered.

3           I'm going to let the -- I will tell the defendants, these  
4 are your motions so you have a right of reply. You have to  
5 allocate that yourself by just stopping talking sometime before  
6 the 30 minutes is up; and then if you don't stop talking, the  
7 30 minutes elapses, I'll conclude from that you've made the  
8 tactical decision not to make a reply argument.

9           But it's your motion and so you can go first. Before you  
10 start -- and it's Mr. Plunkett; correct?

11           **MR. PLUNKETT:** That's correct.

12           **THE COURT:** Very good. Mr. Plunkett and other  
13 persons, before you start, just a couple of observations.

14           First, as to the -- much is made by the Direct Purchaser  
15 plaintiffs and the Indirect Purchaser plaintiffs to the effect  
16 of "Your Honor already decided all these issues so just stay  
17 right where you are" and that, of course, has some superficial  
18 appeal; and if I was them, I'd probably make that argument  
19 also. I might not make it as frequently or as strenuously as  
20 they do, but I would make it.

21           Some things were decided subject to further discovery, but  
22 they were decided, and some things were simply not decided. So  
23 the question of whether there was a direct effect in the  
24 United States was decided. That question was decided, and I'm  
25 the one who sent the parties off with jurisdictional discovery.

1 So I don't think it's -- I don't know that it's 100 percent  
2 correct that the Irico defendants need to meet the motion for  
3 reconsideration standards.

4 I don't think that's actually helpful to hold these  
5 motions up to those particular standards, but I do think it's  
6 worth observing that I considered most of the same authorities  
7 and not very much different information, and that's the  
8 conclusion that I reached.

9 On the other hand, with regard to the question of whether  
10 Irico Display is an organ of the state, I simply didn't decide  
11 that question at all. It was urged upon me by the Irico  
12 defendants that Irico Display was an organ of the state, and I  
13 found that the Zhang declaration, which was the only evidence  
14 offered in support of that point, was not -- I was not able  
15 simply to consider that declaration. So I simply made a  
16 finding that they hadn't met their *prima facie* burden at that  
17 stage of the case. So that question, I would say -- on that  
18 question there is a much cleaner slate.

19 And to say just one more thing and to be a little clearer,  
20 the fact that I decided on that first point before doesn't mean  
21 that I've already decided it. It just means that the  
22 defendants have more of an uphill burden or uphill battle.

23 And then the last thing I would say is these motions  
24 obviously are very important to the parties. I don't regard  
25 them as incredibly complicated. They're very interesting and

1 they're very well briefed on both sides, but they don't have  
2 that many moving parts. So I look forward to your arguments.

3 Mr. Plunkett, finally I'll let you have the floor.

4 **MR. PLUNKETT:** Thank you, Your Honor, and thank you  
5 for that guidance. I look forward to the uphill battle when I  
6 get to that commercial activity exception.

7 I'm here to respond primarily to the -- on the four  
8 motions to dismiss. As you've noted, there is a lot of  
9 overlap. Mr. Taladay is here principally to respond to  
10 anything DOJ might raise. There is a lot of overlap. Subject  
11 to Your Honor's instructions, I've said I'm not going to be  
12 insulted if anybody jumps up when I can't answer a question or  
13 I'm failing to make a point.

14 But what I plan to do now -- and someone's going to give  
15 me the hook hopefully after 10 or 15 minutes -- is talk about  
16 the three main issues in the case. The first has to do with  
17 whether Irico made sales in the U.S. The second has to do with  
18 whether the commercial activity exception applies, and I'm  
19 going to address directly the uphill battle because I think  
20 there's no problem, Your Honor, getting up that hill. And then  
21 the third is one that applies to just two of the motions, and  
22 that's whether Irico Display qualifies as an organ.

23 On the first argument, we have always said, since our  
24 first filing in this case, that Irico Group and Irico Display  
25 made no sales in the United States and that remains absolutely



1 true. There is no evidence whatsoever of any transaction  
2 between Irico and any U.S. entity period. Irico was set up by  
3 the Chinese government to make sales domestically and that is  
4 largely what they did.

5 Plaintiffs try to muddy this up in a few ways. The most  
6 significant and troubling of which is their reliance on about  
7 \$7 million in sales into the United States by an entity  
8 called -- I'm going to do this for the court reporter's  
9 benefit -- China --

10 **THE COURT:** Isn't it 8 million?

11 **MR. PLUNKETT:** It may be 8 million.

12 **THE COURT:** I think Mr. Saveri thinks it's 8.

13 **MR. PLUNKETT:** Let's go with 8 because it wouldn't  
14 matter if it was a hundred million --

15 **THE COURT:** Okay.

16 **MR. PLUNKETT:** -- because of what I'm about to say.

17 So the entity is called the China National Electronics  
18 Import and Export Caihong Company; Caihong spelled  
19 C-A-I-H-O-N-G. I think everyone here today will refer to that  
20 entity by an acronym CNEIECC, which is C-N-E-I-E-C-C.

21 CNEIECC is an unrelated state-owned entity that was not  
22 owned in any part by Irico Group or Irico Display during the  
23 relevant period.

24 **THE COURT:** There's a declaration that says that;  
25 right?

1           **MR. PLUNKETT:** There's a declaration that says that.

2           **THE COURT:** And then there's some pieces of paper that  
3 say otherwise.

4           **MR. PLUNKETT:** There are three pieces of paper that  
5 plaintiffs rely on, unfortunate documents that were created by  
6 individuals who didn't --

7           **THE COURT:** Why would someone make that up?

8           **MR. PLUNKETT:** I don't know, but they --

9           **THE COURT:** No, no. Let's stop here. I mean, I love  
10 we're off to a good humored start and that sort of augers well  
11 for everyone's afternoon, but let's really focus on this  
12 question for a second.

13           What possible motivation could someone have had to sit in  
14 a room and say, "I know what I'll do. I'll put CNEIECC in an  
15 org. chart where it doesn't belong"?

16           **MR. PLUNKETT:** I don't know their motivation, but I  
17 can give this perspective. In a huge pile of documents, there  
18 were three instances where the ownership was misstated, but  
19 plaintiffs can't make a fact true by relying on documents that  
20 are mistaken. Instead, where the Court should look is to the  
21 official Chinese records, which show that in 2014 after the  
22 class period, 100 percent of CNEIECC was transferred by its  
23 100 percent owner to Irico Group.

24           How could that transfer have taken place in 2014 if Irico  
25 Group had owned any part of CNEIECC before 2014? I don't think

1 plaintiffs can stand up here --

2           **THE COURT:** Well, lots of things could have happened  
3 before 2014. I mean, it's not as though -- it's not like chain  
4 of custody. It's not like I know what was happening with that  
5 entity every day. And so if someone says in 2000 -- and I  
6 don't remember what date this -- and, by the way, for the  
7 plaintiffs, there was many, over a hundred-page exhibit in  
8 which that single page showing those sales was located and  
9 nobody gave me the page number so it took me a little while to  
10 find.

11           But, anyway, whatever year that was from, lots of things  
12 could happen in terms of ownership change; right?

13           **MR. PLUNKETT:** Nothing did happen, Your Honor. The  
14 historical records that we've cited show that CNEIECC was  
15 created and at the time it became a wholly owned subsidiary of  
16 an entity that has another acronym, the China National  
17 Electronics Import and Export Corporation. It became a wholly  
18 owned subsidiary of that entity, which I will call CEIEC,  
19 C-E-I-E-C, in 1987 and it remained as such until 2014.

20           **THE COURT:** Who produced the document that contains  
21 the organization chart?

22           **MR. PLUNKETT:** We would have produced that document.  
23 We produced all documents that we had that related in any way.

24           **THE COURT:** So one of the Irico entities did that?

25           **MR. PLUNKETT:** We produced those documents, yes,

1 Your Honor.

2 **THE COURT:** Right. Okay.

3 **MR. PLUNKETT:** But, again, we think the only -- it's  
4 an objective question and so the place to look is the public  
5 record in China of this transaction and ownership.

6 Let's say I wouldn't have a job if my clients had  
7 perfectly consistent documents over multiple years, but I --  
8 and I will also note that the references, even in those  
9 documents, are -- they're all -- none of them are consistent.  
10 One says, you know, that it's a branch, and so they're even  
11 inconsistent. The only thing that is consistent is the public  
12 record.

13 I would also note, just as sort of icing on the cake, that  
14 even if CNEIECC were a related entity and its sales counted as  
15 our sales, which they don't, none of the sales they cite are  
16 relevant. They all concern irrelevant products. They don't --  
17 some of the products don't contain CRTs. They were not shipped  
18 to the U.S., and one of them is about a sample sale where the  
19 products were sent back to China.

20 **THE COURT:** Isn't it about 2,000 units, that sample  
21 sale?

22 **MR. PLUNKETT:** Yes.

23 **THE COURT:** Yeah, I think about that transaction a  
24 little differently.

25 **MR. PLUNKETT:** Yeah. And that all of those sales,

1    though, are CNEIECC so they're not Irico sales. And plaintiffs  
2    don't even make an effort to say, nor could they say, that  
3    those sales could be attributed to us under some theory of  
4    alter ego or agency.

5           The other way that plaintiffs try to muddy the water on  
6    this no U.S. sales issue is by talking about Irico (USA).  
7    There is a complicated and somewhat unclear story about this  
8    entity, but the following facts are true and it makes Irico  
9    (USA) Inc. completely irrelevant. It never acted as an agent  
10   for sales from Irico Display, there are no evidence that it  
11   sold Irico CRTs, and all of the purchases in the record that  
12   Irico U.S. made were from CNEIECC, the unrelated entity. And  
13   what is more, every single sale went to a different country,  
14   not to the U.S. So Irico (USA) is not relevant here.

15          Finally, IPPs launch an argument and say Irico had  
16   knowledge of indirect sales, Irico knew that customers it was  
17   selling to in China were selling into the United States; but  
18   without going through each exhibit in detail, I will make the  
19   following representations, which were in our reply brief. Not  
20   one of IPPs exhibits establishes Irico's knowledge of sales in  
21   the U.S.

22          Number two, the IPPs have no evidence that any Irico  
23   product, any Irico CRT, ever wound up in a product that was  
24   sold in the United States. After a year and a half of  
25   discovery with us --

1           **THE COURT:** Say that sentence again, please.

2           **MR. PLUNKETT:** IPPs have no evidence of an indirect  
3 sale, essentially that an Irico CRT wound up in a product that  
4 was sold in the United States, and that's after many, many  
5 years, as Your Honor knows, of discovery of multiple of  
6 defendants, including manufacturers who sold in the  
7 United States. All they can come up with is this hodgepodge of  
8 e-mails that suggest maybe there was a sale. If they -- if  
9 there had been a sale, they would have the evidence of that.

10           I'd like to move to the second issue, the commercial  
11 activity exception. To fit within this exception, Your Honor,  
12 in the Ninth Circuit under the *Terenkian* case, there has to be  
13 a direct connection between the act and the effect without any  
14 intervening object, cause, or agency.

15           This generally means, for example, that the U.S. must be  
16 the place of performance of a contract or needs to be the place  
17 where a contract -- or the actions of defendants would result  
18 in a breach of contract with a United States resident. In  
19 other words, there's generally --

20           **THE COURT:** It's not a contract case.

21           **MR. PLUNKETT:** Say again?

22           **THE COURT:** It's not a contract case.

23           **MR. PLUNKETT:** This is not a contract case.

24           **THE COURT:** One of the places -- one of the points of  
25 friction this afternoon -- and I thought the United States

1    *amicus* brief was very helpful on this point -- was the question  
2    of whether there need to be, as your clients say, direct sales  
3    into the United States.

4            **MR. PLUNKETT:** Right. We think that in this case  
5    direct sales are the only thing -- in an antitrust case like  
6    this, direct sales by our client would be the only type of  
7    conduct that could possibly satisfy the commercial activity  
8    exception.

9            So -- right. So what I'm going to get to is that because  
10   there's no sales, I think we're probably all going to agree  
11   that the question under the commercial activity exception is  
12   whether it is enough that we participated in a conspiracy that  
13   raised global prices, including in the U.S., causing U.S.  
14   customers to pay higher prices. That's the theory they have to  
15   proceed on and that's the question under the Foreign Sovereign  
16   Immunities Act: Is that enough to show a direct effect?

17           **THE COURT:** Now, you and I can agree that under the  
18   FTAIA there are circumstances in which -- putting the question  
19   of state actor to one side -- okay? -- we'll take the Foreign  
20   Sovereign Immunities Act off the table, but otherwise that  
21   might be sufficient to hold a defendant in the case under the  
22   FTAIA; correct?

23           **MR. PLUNKETT:** There are FTAIA cases that come close  
24   to that. I can distinguish each one of those on the basis that  
25   all of them --

1           **THE COURT:** I can't tell what you think the answer to  
2 my question is.

3           **MR. PLUNKETT:** I think the answer -- I think it's no.

4           **THE COURT:** Okay.

5           **MR. PLUNKETT:** I think the answer is no because the  
6 FTAIA precedent is all distinguishable on the basis that there  
7 were direct sales. But I think the more important issue is  
8 that the FTAIA precedent cannot be applied to the Foreign  
9 Sovereign Immunities Act for several reasons, and that's the  
10 hill.

11           **THE COURT:** Well, that is not where I was going. I  
12 know you think that.

13           **MR. PLUNKETT:** Okay.

14           **THE COURT:** And had you said yes to my other question,  
15 I might have wondered aloud, let's say I'm a French company and  
16 I'm engaged in this conspiracy and I'm not a state actor, I'm a  
17 privately held company, or what we would in this country call a  
18 public company. I can engage in this antitrust tortious  
19 conduct and I'm liable.

20           And common users of the term "commercial activity" would  
21 immediately characterize what I'm doing as commercial activity,  
22 and so then that begs the question: What is it about the way  
23 we use that term in the Foreign Sovereign Immunities Act  
24 context that would make it not apply here?

25           But you didn't answer the question that way so I won't ask



1 you that question, but now you know I'm thinking that.

2 **MR. PLUNKETT:** Okay. Now I know what you're thinking.  
3 In that case with a private company, they don't -- their source  
4 of personal jurisdiction in a U.S. court is not the Foreign  
5 Sovereign Immunities Act.

6 **THE COURT:** Right.

7 **MR. PLUNKETT:** Rather, it would be, you know, all of  
8 the due process precedent or the long-arm statute of the  
9 specific state where they were sued and due process  
10 limitations.

11 When it's a foreign sovereign, as it is here, the source  
12 of personal jurisdiction is the Foreign Sovereign Immunities  
13 Act; and so in the Ninth Circuit, personal jurisdiction  
14 standards have to be met under the commercial activity  
15 exception.

16 **THE COURT:** Actually now that I think about it, that  
17 thought that I uttered is not that helpful because "commercial  
18 activity," that phrase is not really where the action is this  
19 afternoon. Direct effect is really where the action is.

20 **MR. PLUNKETT:** Yeah. I agree with that.

21 I'd like to make my points on why, even though we think  
22 those FTAIA cases are distinguishable and don't stand for the  
23 proposition that conspiracy is enough -- I'll use that  
24 shorthand -- those principles, even if they did exist under the  
25 FTAIA, cannot and should not be applied under the Foreign

1 Sovereign Immunities Act.

2 The statutes use very different language. They have the  
3 single words "direct" and "effect" in common, that's true, but  
4 they have very different purposes. The FSIA is jurisdictional.  
5 It's not an antitrust statute. It applies in personal injury,  
6 contract, and antitrust cases alike, and it is the only source  
7 of jurisdiction over a foreign sovereign.

8 The FTAIA couldn't be more different. It is an antitrust  
9 statute that informs the merits of the case and adds additional  
10 elements to Sherman Act claims involving foreign trade.

11 For that reason, courts do not conflate the two statutes.  
12 A search for -- a search in Supreme Court cases, Ninth Circuit  
13 cases, and all district courts within the Ninth Circuit turns  
14 up only three decisions that even mention FTAIA and FSIA in the  
15 same decision. One of those is irrelevant so I'm not going to  
16 talk about it, the other one is this Court's order setting  
17 aside the default in this case, and the third one is a  
18 Ninth Circuit case called *LSL Biotechnologies*.

19 In *LSL Biotechnologies*, there's one paragraph where the  
20 court says: This is an FTAIA case and we need to define the  
21 word "direct." It just so happens that the Supreme Court just  
22 did that in the *Weltover* case so we're going to use that  
23 definition.

24 There's no discussion by the Ninth Circuit that these  
25 statutes are -- that these statutes are comparable or they

1 should --

2 **THE COURT:** I don't know if Mr. Taladay's note already  
3 told you this, but you've been going about 15 minutes.

4 **MR. PLUNKETT:** Yeah, he did just tell me that. I'm  
5 going to finish this point up and then sit down before I get  
6 yelled at.

7 So *LSL Biotechnologies* --

8 **THE COURT:** For the benefit of the record, I'm not  
9 going to yell at you. I don't know about Mr. Taladay.

10 **MR. PLUNKETT:** I was referring to Mr. Taladay for the  
11 record.

12 *LSL Biotechnologies* cannot bear the weight that plaintiffs  
13 and the DOJ want to put on that paragraph that these statutes  
14 can be read together. That one paragraph in the Ninth Circuit  
15 case caused several other courts in the Second and  
16 Seventh Circuit to say, "Wait a second, Ninth Circuit. These  
17 statutes are very different."

18 And then the final point I'm going to make is that there  
19 are five Ninth Circuit cases which hold that under the  
20 direct-effect standard, you have -- under the exception, you  
21 have to consider personal jurisdiction standards. They are  
22 part of the direct-effect standard.

23 And plaintiffs have said that the Supreme Court overruled  
24 that line of cases in *Weltover*. Nothing can be further from  
25 the truth. It's the one case I brought up here to read. It's

1 very short. I'm not going to read it, but it does -- what the  
2 Supreme Court does in that case is actually apply due process  
3 standards when considering the commercial activity exception.  
4 It not only didn't overrule what the Ninth Circuit had held, it  
5 followed it.

6 And I'll reserve the rest of our time. Thank you,  
7 Your Honor.

8 **THE COURT:** Thank you, Mr. Plunkett.

9 Mr. Taladay. Or do you want to wait and save it for reply  
10 to after Mr. Levin has put his oar in the water, or what do you  
11 want to do?

12 **MR. TALADAY:** Yes, I prefer to do that, Your Honor.

13 **THE COURT:** Very good. Okay.

14 Let me hear, then, from the plaintiffs.

15 **MR. RAPAWY:** Thank you, Your Honor.

16 And may it please the Court, I would like to start with  
17 the --

18 **THE COURT:** Is it Mr. Rapawy?

19 **MR. RAPAWY:** Yes.

20 **THE COURT:** Very good.

21 **MR. RAPAWY:** Thank you, Your Honor.

22 I would like to start with the organ question, Your Honor,  
23 which you had described as being open. I think it is a  
24 complicated one because there are a number of factors, but  
25 ultimately those factors all point in our direction.

1       Display was -- I'm sorry -- was not an organ of the  
2 Chinese state in November 2007 because it was engaged in a  
3 characteristically private activity of manufacturing and  
4 selling display tubes to earn profit for its shareholders. And  
5 at that time in 2007, its shareholders were more than two  
6 thirds private. So the majority of its profits and the  
7 majority of its assets were going for private benefit.

8       That is the overarching question of whether it is engaged  
9 in a public or private activity, which the six factors that are  
10 applied by the Ninth Circuit in cases such as *Powerex* and  
11 *Patrickson* are meant to inform. And when you walk -- then go  
12 ahead to walk through those six factors, each of them continues  
13 to point in the same direction of saying this was a company  
14 that was engaged in private and not in public activity.

15       The first factor, as Your Honor knows, is the  
16 circumstances of Display's creation, and we think that the  
17 controlling document there is the 2006 version of the Articles  
18 of Association. Your Honor will recall that in your previous  
19 opinion we had tried to rely on the 2008 version. You said  
20 that you needed to see something from before the filing of the  
21 complaint, quite correctly. We now have the 2006 version. It  
22 is quite unambiguous that this is a standardized joint stock  
23 company formed under the same laws that apply to all Chinese  
24 companies, whether private or public, the company law and the  
25 securities law.

1       There's some further explanation of that legal framework  
2       in our expert declaration by Professor Milhaupt. So in our  
3       view that factor points in our favor.

4       And even if you were -- and, now, Display will say that  
5       you should look at the earlier documents, the ones from 1992  
6       and 1995, in which they were originally set up as a majority --  
7       in fact, as a wholly owned public company and then there was  
8       private investment allowed, but I think that the correct  
9       approach is to look at it at the time of the filing of the  
10      complaint. And we've cited the *Janvey* case from the  
11      Fifth Circuit in our briefs on that point, and I think it is  
12      persuasive.

13      The second factor is the purpose of the activities, and  
14      this in some respects is sort of a miniature version of the  
15      overall question, whether the purpose is a public purpose or a  
16      private purpose. And we maintain that making profit for a  
17      largely private shareholder is a private purpose, and that that  
18      was the -- and the record -- in the record Display is  
19      consistently described as a competitor in the market with other  
20      companies and as attempting to meet demand and maximize its  
21      sales and maximize its revenues and minimize its costs in the  
22      same way.

23           **THE COURT:** I think you probably win on this point.

24           **MR. RAPAWY:** Understood.

25           **THE COURT:** I'm just telling you. I mean, I think

1 about this question of, well, you have to build a hospital or  
2 you've got to build a school or something. You know, there are  
3 lots of instances in which, particularly in even slightly more  
4 regulated economies than the one we have in the United States,  
5 in which the government will require corporations to do certain  
6 things that produce a public benefit. "You have to build this  
7 blah, blah, blah before we'll let you, you know, relocate  
8 here," that sort of thing.

9 And the idea that making their workers better off is a  
10 public benefit, all corporations that pay their workers make  
11 their workers better off. I really think the fight today is  
12 going to turn out, for the most part, to be about direct  
13 effect.

14 **MR. RAPAWY:** Okay, Your Honor.

15 **THE COURT:** That's not the only issue but it's by far  
16 the biggest one.

17 **MR. RAPAWY:** I can certainly move ahead to that if  
18 Your Honor would prefer.

19 On the question whether they had to build hospitals,  
20 Your Honor, a factual point that I think I would like to assert  
21 against the reply is Display itself does not build hospitals.  
22 It was Group that built hospitals and one-third of Display's  
23 profits went up to Group to use for that if it wanted to.

24 Very briefly on the rest of the factors, the independence  
25 from the government, we think that is largely controlled by the

1 Articles of Association that have very strong independence  
2 language in them; and their corporate representative, as we  
3 explain in our brief, adopted the relevant parts of the  
4 Articles and of their 2007 annual report. All this very strong  
5 independence language, when we got him on the stand or at the  
6 table, he said, "Yes, what's written is just how it is." And I  
7 think that the declaration that they rely on to the contrary is  
8 neither based on personal knowledge nor at all persuasive in  
9 light of those concessions.

10 On the fourth factor, which is financial support of the  
11 government, we rely on the figures from their own annual report  
12 to show that it was less than 1 percent of their operating  
13 revenues in 2007.

14 On the fifth factor, there's no contention that most of  
15 their employees were civil servants. There's an argument about  
16 the senior management, but I think we have the better of that  
17 one; and even if we don't, I don't think it matters.

18 **THE COURT:** Jo Ann, can you type that fast?

19 **THE REPORTER:** Yes.

20 **MR. RAPAWY:** I will attempt to slow down, Your Honor.  
21 My apologies.

22 And then the sixth factor, the special privileges and  
23 obligations, things like being immune from taxes, being immune  
24 from private suit, they don't have any of that under Chinese  
25 law and they don't claim to.



1           On the direct-effect point, Your Honor, we do maintain  
2           that the overall principle is that where a defendant is engaged  
3           in a global cartel and where the United States is a major  
4           market for the products that are price fixed or products as to  
5           which the price fixed products are a substantial cost  
6           component, that is sufficient. They know that they are  
7           changing prices in the United States through their actions  
8           overseas, and that is enough for jurisdiction under either of  
9           the FSIA or the FTAIA or, for that matter, the due process  
10          clause.

11          A defendant that is engaged in one of these cartels simply  
12          cannot say in a U.S. court, "Well, I may have fixed prices in  
13          your country -- that affected your country, but you have no  
14          jurisdiction over me."

15          I think that that -- that the argument that the FSIA  
16          requires direct sales is almost entirely foreclosed by the  
17          language of the statute.

18               **THE COURT:** I have it open in front of me.

19               **MR. RAPAWY:** Well, Your Honor, as you know, then,  
20          there are --

21               **THE COURT:** Is it possible that you're about to refer  
22          to the fact that subsection (2) focuses on an act performed in  
23          the United States and that subsection (3) focuses on an act  
24          outside the territory of the United States?

25               **MR. RAPAWY:** It was possible, Your Honor; and if

1 Your Honor does not find that point persuasive, I'm happy to go  
2 on.

3 **THE COURT:** No, no, no. I'm acknowledging the point  
4 in advance of its having been made. So you can make the  
5 argument. I want to hear what you have to say. This is the  
6 thing I was probably thinking about when I got on the bench  
7 this afternoon.

8 **MR. RAPAWY:** Very good, Your Honor.

9 Well, I do think the text is in just the way Your Honor  
10 has suggested it is. If not controlling, it gets us almost all  
11 the way there all on its own and then the case law from the  
12 Ninth Circuit, the *Hsiung* case, which is an FTAIA case.

13 And I do want to address the question -- the question as  
14 to whether direct effect under the FTAIA and under the FSIA  
15 should be given different meanings. And I think that if you  
16 look at *LSL Biotechnologies*, which I know Your Honor has  
17 because you already cited it, and if you look at the way that  
18 that test is further applied in *Hsiung*, you see that what those  
19 cases are doing is they are taking the definition of "direct  
20 effect" from *Weltover*, which -- and *Weltover* itself is an FSIA  
21 case -- and they're saying applying that definition, it is met  
22 under these fact patterns that are not really distinguishable  
23 from our own.

24 So, Your Honor, if there were doubt about whether the FSIA  
25 and the FTAIA should have different definitions of "direct,"

1 then that might mean that the Ninth Circuit's analysis in *LSL*  
2 or in *Hsiung* was not correct, but those cases would still help  
3 us because they were applying the *Weltover* standard and the  
4 *Weltover* standard is unquestionably controlling here.

5 We've also cited the *Flat Panel* case, which I think is  
6 persuasive, from Judge Illston on the same point. And then we  
7 have the *Sea Breeze* case, which is under the FSIA itself. When  
8 we were last before Your Honor, actually Your Honor found that  
9 case so I can't take really credit for finding it, but you had  
10 relied on the district court case. It's now been affirmed by  
11 the Ninth Circuit. There is a footnote in the Ninth Circuit  
12 decision saying they agree with the district court's analysis.  
13 The district court's analysis is directly on point here.

14 There is an attempt in the reply to distinguish *Sea Breeze*  
15 by suggesting that there were breaches of contract in that  
16 case, and there are not breaches of contract here in the  
17 United States; but I believe that if you refer to those cases,  
18 you will see that in *Sea Breeze*, the breaches of contract were  
19 not breaches of contract by a Mexican foreign sovereign entity  
20 in the United States but, rather, the Mexican foreign sovereign  
21 entity breached a case -- breached a contract with an  
22 intermediary called Innofood and then Innofood breached the  
23 contract with *Sea Breeze*, which was the United States entity.

24 So after taking that into account, the case is still  
25 directly inconsistent with the direct sales requirement or

1 direct breach of contract requirement that they claim controls  
2 here.

3 Their cases do not support a direct sales rule, the ones  
4 that they cite. I will rest on the briefs on that point unless  
5 Your Honor wants to talk about one of the cases that they cite.

6 I think the facts that we have, based on the licensure  
7 report and on the meeting e-mails, show that there was at least  
8 awareness of effect on the United States market and that that  
9 is enough under the FSIA and FTAIA standard.

10 On the question of whether the minimum contacts  
11 requirement is incorporated, I think the best reading of  
12 *Weltover* is that it is not, and I think the discussion of the  
13 due process requirement in *Weltover* does not conflict with  
14 that. Because what the Ninth Circuit -- excuse me -- what the  
15 Supreme Court did in *Weltover* is it first did the statutory  
16 analysis under the FSIA, and then it went on to say "It's  
17 argued that there's a constitutional problem here, but we don't  
18 have to reach that question because there would have been the  
19 normal contacts anyway."

20 If, as *Irigo* has claimed, the direct contacts -- or the  
21 minimum contacts requirement were part of the FSIA requirement,  
22 then they would have done it as part of the statutory analysis,  
23 not as a separate means of avoiding the constitutional  
24 question.

25 That said, if there is doubt about that, I think we have a

1 very good case for minimum contacts in the United States based  
2 on Judge Conti's earlier analysis even without direct sales. I  
3 don't think that direct sales are required under the due  
4 process clause, and so Your Honor could certainly tie that  
5 point off completely by finding, as the Supreme Court did in  
6 *Weltover*, that on these facts we have minimum contacts  
7 regardless of whether it's required.

8 On the question of whether there were direct sales in the  
9 United States and this whole issue with the intermediary, which  
10 we've called import/export in our briefs, and the Irico (USA)  
11 entity, we rely on this evidence not to attempt to attribute  
12 those sales up the chain by piercing every veil, but to  
13 reinforce our showing that when they entered into the cartel  
14 and when they fixed the prices, they were well aware of the  
15 effect that that would have on U.S. prices because they were  
16 watching the U.S. market trying to get into the market and  
17 through the subsidiary, I would say, even making a few sales in  
18 the U.S. market.

19 And I'm referring to a -- especially to these so-called  
20 sample sales. I don't think the record compels the conclusion  
21 that there were samples -- those were samples. Excuse me.  
22 They do say they were samples, but we have an invoice showing  
23 the sale. They do not have any documentation or evidence  
24 showing that they took those products back. They do not have a  
25 witness to say that and they don't have an exhibit to say that

1 unless I have missed something, Your Honor.

2 **THE COURT:** Well, I'm sure they'll say on reply if  
3 they think you did miss something.

4 **MR. RAPAWY:** I'm sure they will, but I didn't find one  
5 when I was preparing for this so I'll look forward to hearing  
6 if I missed something.

7 And so a mere representation from counsel, while I'm sure  
8 they believe it to be true and they're stating it as fact --

9 **THE COURT:** But there's participation in these  
10 meetings, which is not -- the participation in the meetings  
11 discussing the conspiracy, this also is not disputed in the  
12 record. It doesn't need to be for today's purposes, but it's  
13 not disputed I don't think.

14 **MR. RAPAWY:** I agree, Your Honor.

15 **THE COURT:** I'm saying that out loud because also I  
16 would like to be corrected on reply if what I just said is  
17 wrong.

18 **MR. RAPAWY:** Your Honor, if they were to dispute the  
19 participation in those meetings, it would be for the first time  
20 today with one exception. There was a footnote in the reply in  
21 which they say that we didn't show that Display had employees  
22 present at those meetings.

23 And I was surprised to see that because one of the people  
24 who was present at those meetings -- at a number of those  
25 meetings was Mr. Wang Zhaojie, who was their declarant on

1   behalf of Display and their 30(b)(6) representative on behalf  
2   of Display and who they claim had extensive familiarity with  
3   Display because he was responsible for running Display's  
4   overseas sales.

5           Now, he may not technically have been an employee of  
6   Display, in fact he was not, but I think it is a reasonable  
7   inference from the fact that they have described this intimate  
8   knowledge that he had of Display's activities and the fact that  
9   he was present at these meetings.

10          And I can cite you for examples to the 2017 Saveri  
11   declaration, Exhibits 13, 14, 19, 21, 23, 30, and 32. He was  
12   present at all of those. So the idea that Display didn't know  
13   what was going on at these meetings is, I think, Your Honor,  
14   not credible on this record.

15          I did want to make one additional point in response to  
16   something that --

17           **THE COURT:** Knowing that -- I mean, this is a little  
18   bit of a frolic, but knowing that a conspiracy was discussed at  
19   a meeting doesn't make you a participant in a conspiracy under  
20   any version of conspiracy law that I'm aware of, does it?

21           **MR. RAPAWY:** Well, but the question -- I mean, so that  
22   on the merits question we have to prove that they participated  
23   in the conspiracy; but for the personal jurisdiction question,  
24   we have to prove that they were aware of the -- well, we do  
25   have to prove that they participated in the cartel, and I do

1 think you can infer that from the documents.

2 But the main point I'm making is that, you know, the claim  
3 that Display didn't know what was going on in the United States  
4 is --

5 **THE COURT:** Hard for you to believe.

6 **MR. RAPAWY:** It is hard for me to believe, Your Honor.  
7 I hope it's hard for you to believe as well.

8 And the one last point I wanted to make in response to  
9 something that Mr. Plunkett had said was that he had said that  
10 Irico was set up for domestic sales. If you refer to page 247  
11 of their 2007 annual report, which is one of our -- one of our  
12 exhibits -- no, no. I'm sorry. It's Amended Plunkett  
13 Declaration, Exhibit 2. It's the 2007 annual report. You will  
14 see that there's a note there that 21.5 percent of Display  
15 sales were overseas.

16 So maybe that is them consolidating something from another  
17 entity, but based on the annual report itself, this is clearly  
18 an entity that believed itself to be doing business in the  
19 export market consistent, frankly, with all of the meeting  
20 e-mails and discussions.

21 **THE COURT:** Let me come at this a slightly different  
22 way. Wasn't Group -- to the extent that Group was involved in  
23 the conspiracy, was there any other manufacturers of CRTs to  
24 which they could have been referring when they were making  
25 their promises to keep prices high other than Display?



1           **MR. RAPAWY:** I don't think so, Your Honor.

2           **THE COURT:** Okay. I mean, I think that's the point.

3           **MR. RAPAWY:** I'm happy to take the correction,  
4 Your Honor. I think that's an excellent way to put it.

5           Unless you have further questions, I think I'll probably  
6 turn it over to Mr. Alioto at this point.

7           **THE COURT:** All right. Very good.

8           **MR. RAPAWY:** Thank you, Your Honor.

9           **THE COURT:** Mr. Alioto.

10          **MR. ALIOTO:** Thank you, Your Honor.

11          I just wanted to make one point about the record that we  
12 have before Your Honor. This is unusual. Usually this type of  
13 motion would come up at the inception of a case. Here we have  
14 a complete trial, pretrial record. We have a case prepared for  
15 trial and a full record.

16          And I wanted to just emphasize on this question of direct  
17 effect, you couldn't have a fuller picture of that, and I'm  
18 sure these other cases that raised these questions at the  
19 inception of the case have no record anything like what we have  
20 here.

21          The Indirect Purchasers --

22          **THE COURT:** It is a little strange. Can I just say  
23 it's a little strange? I reread my February 2018 order before  
24 I took the bench, and it just offhandedly says, "Well, the DPPs  
25 want discovery so everybody can have discovery." But in 99 out

1 of 100 other cases, that order would have been the end of it,  
2 and we would have just started litigating --

3 **MR. ALIOTO:** Yes.

4 **THE COURT:** -- but that's okay.

5 **MR. ALIOTO:** Yes.

6 **THE COURT:** And next time the DPPs will say,  
7 "Your Honor, we're withdrawing our request for discovery if you  
8 rule a certain way." So...

9 **MR. ALIOTO:** And although the record is complicated  
10 and there's quite a bit of factual material in the record, I  
11 think it does make Your Honor's life a little easier because  
12 we're not talking about allegations here. We're not talking  
13 about we believe there was a direct effect on the United States  
14 or we think or we have alleged.

15 We, the IPs and the DPs as well, the Direct Purchasers,  
16 have prepared a case and you have before you the highlights of  
17 that case and you have before you, for example, in the Indirect  
18 case our expert report, a report that said there were meetings,  
19 a report that summarized the evidence, a report that went so  
20 far as to say that "I've reviewed all of these documents and I  
21 have done my economic work and I have done my econometrics, and  
22 I determined that there was impact in the United States, there  
23 was impact on purchasers in the United States."

24 That is -- that's the essence of what we're dealing with  
25 here. That's direct effect, not a sale here or a sale there;

1 impact in the United States. And we have it based on the  
2 evidence and based on expert testimony. We have that in front  
3 of Your Honor.

4 Furthermore, and this is something you don't get on these  
5 motions because of the way they come up at the beginning of the  
6 case, you have our expert, and I believe the Direct's expert as  
7 well, opining on percentage overcharges. I believe it's  
8 9 percent on picture tubes and double digit on -- 9 percent on  
9 television, 25 percent on computer monitors. You do the math.  
10 9 percent, 25 percent on the amount of sales involved, sure,  
11 their sales are in the millions of dollars that we know of so  
12 far. We haven't had as much discovery on that as we would like  
13 and we intend to get that, but you figure their sales in  
14 conjunction with the sales of all of the other defendants  
15 because it's joint and several liability on all of the sales,  
16 you apply those overcharges to those sales, 9 percent and  
17 25 percent, and you can see you're talking about damage in the  
18 billions of dollars to purchasers in the United States.

19 That is the direct effect, not an allegation, not my idea  
20 of what's going on, but after several years of discovery, that  
21 is the evidence.

22 And I think that makes Your Honor's job -- I hope it makes  
23 Your Honor's job a lot easier to come to the conclusion that  
24 there was this direct effect and that the commercial activity  
25 exception would apply and that the motion would be denied on

1 those grounds.

2 **THE COURT:** Thank you.

3 **MR. ALIOTO:** Thank you, Your Honor.

4 **THE COURT:** Mr. Levin.

5 **MR. LEVIN:** May it please the Court, first off, we  
6 welcome the -- or we appreciate the ability to appear here  
7 today to address the proper legal framework governing the FSIA.  
8 We only have a couple points to make on the organ prong.

9 **THE COURT:** I just completed a term, a three-year  
10 term, as the judicial representative to the American Bar  
11 Association section on antitrust laws. I was the judicial  
12 representative and in that role I got to appreciate to a very  
13 great degree the role that both the Antitrust Division and the  
14 Justice Department and the Federal Trade Commission play in the  
15 enforcement of the United States antitrust laws, and so it's my  
16 pleasure to welcome you here today and listen to what you have  
17 to say.

18 **MR. LEVIN:** Thank you, Your Honor. We appreciate  
19 that.

20 On organ we only have two brief points. We disagree with  
21 two of the Irigo defendants legal arguments. First, a company  
22 is not an organ simply because it makes money for the state as  
23 a shareholder. If that were sufficient, the companies in  
24 *Patrickson* would have been organs.

25 Second, foreign state control --

1           **THE COURT:** Say the name of the case again.

2           **MR. LEVIN:** *Patrickson versus Dole Foods.*

3           **THE COURT:** Right.

4           **MR. LEVIN:** And, second, foreign state control is not  
5 self-sufficient for organ status. A foreign state could  
6 control -- wholly control an ordinary commercial enterprise,  
7 and for this I would point the Court to the *Victor Fine Foods*  
8 case. In there the processing plant was wholly owned by the  
9 state indirectly and, thus, controlled by it but it wasn't an  
10 organ.

11           So on both of these points, this is why the relevant  
12 inquiry is holistic looking at all the relevant factors and not  
13 a single factor. Other than that, on organ we're content to  
14 rest on our submission.

15           On direct effect, we appreciate -- we're glad that you  
16 found our submission useful. I'd like to say a few remarks  
17 that are mostly directed at the RICO [sic] defendants' reply,  
18 and then I'd also like to --

19           **THE COURT:** I think they said "Irico."

20           **MR. LEVIN:** Oh. The Irico defendants' reply. Then --

21           **THE COURT:** You're in the Justice Department. You're  
22 used to saying the word "RICO," but I think it's Irico.

23           **MR. LEVIN:** I've been told better and I should have  
24 known it's Irico. Thank you.

25           But I'd also like to get to the Court's question on why

1 the FTAIA is useful in this specific context here.

2 On direct effect, we're here for the limited purpose of  
3 asking the Court to reject the Irico defendants' argument that  
4 a foreign state must make sales in the U.S. to fall within the  
5 third prong.

6 And as this Court recognized based on a reading of the  
7 statute, sales in the United States already fall within the  
8 first prong or the second prong. The Irico defendants never  
9 explain what -- under their proposed rule, what would fall in  
10 the third prong but not the first, and we respectfully submit  
11 that their proposed rule robs the third prong of any meaningful  
12 function.

13 In support of their proposed rule, the Irico defendants  
14 advance three incorrect arguments. First, that it's required  
15 by precedent; second, that it's necessary to render the statute  
16 constitutional in order for there to be sufficient minimum  
17 context --

18 **THE COURT:** Would you hold on a moment, please.

19 **MR. LEVIN:** I'm sorry?

20 **THE COURT:** Just hold off a second. I'm making a note  
21 of something you said.

22 (Pause in proceedings.)

23 **THE COURT:** Thanks. Go ahead.

24 **MR. LEVIN:** Second, that it's necessary to render the  
25 statute constitutional; and, third, that it's -- that their

1 proposed rule is necessary for there to be a legally  
2 significant act in the United States giving rise to the claim.  
3 We respectfully submit that each of these three arguments are  
4 inconsistent with Ninth Circuit precedent.

5 First, their proposed legal rule is not mandated by  
6 precedent, and we respectfully submit that it's flatly  
7 inconsistent with the *Sea Breeze* case in which the foreign  
8 state defendant, ESSA, made no sales in the United States.

9 Second, a defendant need not make -- assuming that minimum  
10 contacts apply, a defendant need not make sales in the  
11 United States to have minimum contacts with the United States,  
12 and this is made clear by the *Schwarzenegger* case that they  
13 cite, which says that purposeful direction at a forum is  
14 sufficient for minimum contacts even absent a sale.

15 Third, a defendant does not need to make sales in the  
16 United States for there to be a legally significant act in the  
17 United States giving rise to the claim, and this is made clear  
18 by the *Lyon* case that we cite in our statement of interest. In  
19 that case, the legally significant act in the United States was  
20 the plaintiff's death, not the sale of the defective  
21 helicopter, which was entirely abroad.

22 As for the Court's question on the FTAIA, we think it's  
23 useful because of the way the Court applied the direct-effect  
24 requirement in *Hsiung*, and its useful for the limited  
25 proposition just as support, it's not binding, but for the

1 notion that price fixing of a component product can have a  
2 direct effect on the price of finished goods in the  
3 United States even if the fixing of the component prices was  
4 entirely abroad.

5 **THE COURT:** So I want to go back to a couple of points  
6 you just made in reverse order.

7 So, first, you were talking about a legally significant  
8 act in the United States. I gather that in the view of the  
9 Department of Justice, that in an antitrust conspiracy case,  
10 the legally significant act is a consumer injury in the form of  
11 higher prices; correct?

12 **MR. LEVIN:** Yes, Your Honor.

13 **THE COURT:** And you tried, with mixed success in your  
14 brief, to avoid talking about the specifics of this case and to  
15 operate at a slightly higher level of generality. I'm not sure  
16 I can do that with this next question, which goes back to your  
17 point, which I think -- in which I think you said: As long as  
18 the defendant has minimum contacts, there's no direct sales  
19 into the United States necessary and purposeful direction at  
20 the forum is sufficient to establish minimum contacts. Right?  
21 That's the point you made.

22 **MR. LEVIN:** It can be sufficient.

23 **THE COURT:** It is a way of demonstrating minimum  
24 contacts.

25 **MR. LEVIN:** Yes.



1           **THE COURT:** So my question for you is: To the extent  
2 that you're familiar with the record in this particular case,  
3 what's the purposeful direction?

4           **MR. LEVIN:** Well, we're not here to talk about the  
5 facts in this particular case.

6           **THE COURT:** I was worried you might say that. That's  
7 okay. That's fine. You don't have to address it. Your answer  
8 is consistent with your brief. I might ask one of the  
9 plaintiffs to stand up and answer just that question in a  
10 minute, but go ahead.

11           **MR. LEVIN:** What I was going to say was the purposeful  
12 direction that gets context through cases like *Calder v. Jones*,  
13 cases like the *Western States Wholesale Natural Gas* case, and  
14 they talk about there's a variety of requirements that go into  
15 it. I mean, so we're not talking about its application here,  
16 but we do think I would point the Court to those cases.

17           **THE COURT:** No, I'm familiar with the general  
18 principle that purposeful direction is sufficient to establish  
19 minimum contacts. I'm just wondering in this particular case  
20 what form that takes; but you're right, that's someone else's  
21 job this afternoon. It doesn't have to be your job.

22           **MR. LEVIN:** The last point I would make, unless the  
23 Court has further questions, is that defendants' submission, it  
24 disregards the way in which different parts of a conspiracy can  
25 work together.

1       They're operating under the false premise that a  
2       conspiracy is the sum of its sales. However, as we pointed out  
3       in our submission, there's some conspiracies that don't involve  
4       sales at all, such as group boycotts in the United States where  
5       the conspirators don't have any sales in the United States,  
6       like group boycotts, that, nonetheless, have -- can have a  
7       direct -- substantial and direct effect in the United States  
8       and would be within the third prong.

9       And also the relevant acts in an antitrust conspiracy are  
10      not just the sales. It includes other types of acts, such as  
11      restricting production, creating an agreement to devise  
12      cheating, and so on. For example, if a defendant planned to  
13      sell in the United States but then didn't because pursuant to  
14      an agreement in a conspiracy, it can cause -- the act of  
15      foregoing the sale can cause a direct effect in the  
16      United States even without the actual sale.

17      In a conspiracy often the parts are interrelated and  
18      dependent. For example, an agreement to raise price, it  
19      wouldn't have any effect if everybody else is going to increase  
20      output. So there's often multiple parts to a conspiracy and  
21      the direct effect can come from any of them.

22      So if this Court has no more questions, we appreciate the  
23      ability to appear here today. Thank you.

24               **THE COURT:** I don't have any more questions. Thank  
25      you.

1       Would one of the plaintiffs -- before the reply happens,  
2       would one of the plaintiffs stand up and, limiting yourself  
3       carefully just to this question, would you answer the question  
4       of what you think -- if I find it necessary to go down this  
5       path, what the purposeful direction at the forum of the  
6       United States was on the part of the Irico defendants?

7               **MR. RAPAWY:** Yes, Your Honor. I think that we would  
8       say that the purposeful direction, if Your Honor goes down that  
9       path, is the fact that they knew and intended that they would  
10      increase prices in the United States through the operation of  
11      the cartel as shown by the meeting notes where U.S. dollar  
12      prices and U.S. market conditions were discussed.

13              **THE COURT:** Thank you.

14              Reply. Mr. Taladay.

15              **MR. TALADAY:** Your Honor, I'll speak just for a few  
16      minutes and reserve a few minutes for my colleague,  
17      Mr. Plunkett.

18              **THE COURT:** Very good.

19              **MR. TALADAY:** First to speak to the DOJ points. The  
20      DOJ said several times in its brief that it takes no position  
21      on the facts of this case, but it did take a position on the  
22      facts of this case.

23              The DOJ investigated this case for more than six years.  
24      It's a massive investigation into this market under these facts  
25      with these alleged co-conspirators. There was a leniency

1 applicant. There are numerous subpoenas. There were multiple  
2 cooperating defendants that they had access to, millions of  
3 documents, dozens of witness interviews, cooperation with  
4 foreign authorities who conducted dawn raids and prosecution  
5 and a guilty plea in the United States.

6 And based on this massive investigation, which the DOJ  
7 Antitrust Division conducted, the DOJ's position on the facts  
8 was that it took no action with respect to Irico.

9 **THE COURT:** But hold on. There are so many defendants  
10 in this case who were not criminally prosecuted who paid  
11 millions or many millions of dollars in settlement money, not  
12 out of motives of charity but because the evidence against  
13 them, presumably, was sufficient to cause them and their  
14 counsel's general to conclude they better pay the money rather  
15 than go to trial.

16 I'm taking too long to say this. I don't know that a  
17 nonprosecution decision weighs very much.

18 **MR. TALADAY:** Your Honor, it was beyond a  
19 nonprosecution decision. In fact, the DOJ did not subpoena  
20 Irico. It didn't request interviews of Irico employees. It  
21 didn't even contact U.S. counsel of record in this case for  
22 Irico. It made --

23 **THE COURT:** Why is the exercise of prosecutorial  
24 discretion relevant today?

25 **MR. TALADAY:** Well, Your Honor, if the U.S. DOJ

1 believed that there was, as they imply in their brief, an act  
2 by a nonsovereign that had direct effect in the United States,  
3 one would expect them to execute on their responsibility to at  
4 least investigate that, and I for one repudiate the suggestion  
5 that they failed in their obligation to discharge their  
6 responsibilities.

7 The --

8 **THE COURT:** Is your point that you think the Justice  
9 Department changed its mind about either the sovereign status  
10 of the Irigo defendants or their culpability in the conspiracy?

11 **MR. TALADAY:** I'm sorry, Your Honor. I didn't hear  
12 the question.

13 **THE COURT:** Well, I just want to know where we're  
14 going. Is your point that you feel the United States has  
15 changed its mind either about the sovereign status of the Irigo  
16 defendants or their culpability in the conspiracy?

17 **MR. TALADAY:** No, Your Honor, I don't think they have.  
18 My point, Your Honor, is that actions speak louder than words,  
19 and the actions of the DOJ on the facts of this case is that  
20 they did nothing with respect to Irigo because there was no  
21 basis on which they should have done anything with respect to  
22 Irigo.

23 If there was a direct effect in the United States, they  
24 had every opportunity to identify that and to do something  
25 about it, at least to communicate with Irigo about their

1 concern, and they did nothing. That's my point, Your Honor.

2 So for them to say that they take no position on the facts  
3 of this case I think is belied a little bit by the degree to  
4 which they investigated the facts of this case.

5 Now, Your Honor, just one other point. The direct sales  
6 point. To the extent that the DOJ or even that Your Honor had  
7 previously considered that FSIA direct effect could be based on  
8 the FTAIA, I believe, Your Honor, that is not properly  
9 directed, and the reason is that the FSIA is a jurisdictional  
10 statute. The FTAIA is not. The FSIA, therefore, requires  
11 minimum contacts; whereas, the FTAIA test does not.

12 And where you have purely foreign conduct by a party that  
13 has no minimum contacts with the United States, that is not  
14 sufficient to satisfy FSIA even if it's sufficient to satisfy  
15 the FTAIA.

16 I'll point Your Honor to two authorities. The first is  
17 the Restatement Fourth of the Foreign Relations Law,  
18 Section 454. I believe it's paragraph 9 at page 17, which says  
19 (reading):

20 "No court has held that the commercial activity  
21 exception applies in a situation where a minimum contacts  
22 analysis would not be satisfied."

23 The other authority, Your Honor, would be *Wescott versus*  
24 *Weisner*, Northern District of California 2018, which is Westlaw  
25 2463614.

1           **THE COURT:** You have to say the number again, please.

2       24?

3           **MR. TALADAY:** 2463614 at page 4.

4           **THE COURT:** Is this in the briefs?

5           **MR. TALADAY:** I don't know, Your Honor. I believe so.

6           **THE COURT:** Okay.

7           **MR. TALADAY:** And this goes to the point, Your Honor,  
8       that conduct by co-conspirators, no matter how much that may  
9       have been directed, or by any third party no matter how much  
10      that would have been directed, is not sufficient to establish  
11      conduct by another party. It says, Your Honor (reading):

12                "Where conspiracy is alleged, an exercise of personal  
13      jurisdiction must be based on forum-related acts that were  
14      personally committed by each nonresident defendant and  
15      acts of an alleged co-conspirator cannot be imputed to  
16      establish jurisdiction over the third-party defendant."

17      That is simply to say, Your Honor, that actions by the  
18      parties that we may have sold to -- Irico may have sold to  
19      outside the United States or acts by co-conspirators cannot be  
20      imputed for purposes of minimum contacts or personal  
21      jurisdiction.

22      And, Your Honor, if you look at the corpus of cases that  
23      talk about direct effect, the common thread of all of them is  
24      that there is some privity between the act of the defendant and  
25      the United States.

1 And, yes, Your Honor, there can be acts outside the  
2 United States that give rise to an effect in the United States.  
3 We would not disagree with that. That's what the third prong  
4 clearly says. But in every case there is privity between that  
5 act and the United States, between a purchaser in the  
6 United States, between a lender in the United States.

7 We don't have that here, Your Honor. There is no privity  
8 between any act of the Irico Group with respect to the subject  
9 matter of this case and the United States.

10 I'll cede to my colleague.

11 **THE COURT:** Very good. Mr. Plunkett.

12 **MR. PLUNKETT:** Thank you, Your Honor.

13 I'll quickly respond to some points raised by the DPP in a  
14 question that Your Honor asked about whether we're conceding  
15 participation in a conspiracy. For purposes of jurisdiction,  
16 we're not challenging that we attended the meetings that they  
17 have submitted evidence of.

18 **THE COURT:** Right. I just don't think that's in front  
19 of us today.

20 **MR. PLUNKETT:** Yeah, it's not.

21 **THE COURT:** I don't take it as an admission. I'm just  
22 saying that for today's motion, that's not what I'm seeing.

23 **MR. PLUNKETT:** It's not an admission.

24 But here is the part we do challenge: That any of that  
25 can constitute express aiming at the United States, which is



1 something they have to establish under *Bristol-Myers Squibb* and  
2 the Ninth Circuit precedent that requires in interpreting the  
3 direct-effects test to consider whether the minimum contacts  
4 are met.

5 There could not be a weaker showing by the DPPs of express  
6 aiming at the United States. They point to three e-mails that  
7 they say show that Irico intended to raise prices in the U.S.:  
8 Saveri Exhibits 19 and 26 and 30, and we outline those in our  
9 reply briefs. In one of these there's simply a reference to  
10 U.S. currency. There's no reference to the U.S. market.  
11 There's no statement by Irico. There's no indication that  
12 Irico was going to sell in the United States or that prices  
13 were being discussed. In the other two there's references to  
14 an exchange rate in U.S. dollars.

15 So that is the express aiming here. That is why that  
16 Ninth Circuit precedent, which they are so desperate to say was  
17 overruled by *Weltover* in the Supreme Court, doesn't apply.  
18 Because if it does apply, if the Court considers personal  
19 jurisdiction, they lose. They cannot show any express aiming  
20 by these Chinese companies at the United States.

21 Going to organ status, briefly, I know Your Honor says  
22 that you're not persuaded by the public purposes of Irico  
23 Group.

24 **THE COURT:** That's a tough one for you.

25 **MR. PLUNKETT:** I -- so I'm not going to argue it.

1           **THE COURT:** Group you don't have to worry about. It's  
2 Display.

3           **MR. PLUNKETT:** Yeah. They conceded Group.

4           Display, I am worried about it after Your Honor's  
5 statement, but public purpose is only one of the factors. It's  
6 a multifactor test. We don't have to win all of the factors.

7           Here's the important point with Irico Display. The  
8 experts in this case, their own expert conceded the points that  
9 they make, which is that this is a largely privately held  
10 company where the shareholders have extensive rights. In fact,  
11 what their own expert said at deposition is that the percentage  
12 of shares retained, directly or indirectly, by the parent  
13 company varies but it is always sufficient to retain ultimate  
14 control.

15          There is a --

16           **THE COURT:** What does that really tell me? I'm not  
17 sure -- I'm having trouble getting my hands around that  
18 argument because reduced to its essence, that argument is sort  
19 of, well, you know, in China the percentage of ownership might  
20 say a certain thing, the documents, the corporate governance  
21 documents might say a certain thing, but actually who knows.  
22 That is only a slightly hyperbolic and hopefully not flip way,  
23 I think, of characterizing this argument, and it's your burden.

24           **MR. PLUNKETT:** It is our burden at this point, and let  
25 me explain what I mean.

1           **THE COURT:** So who knows it's not good for you?

2           **MR. PLUNKETT:** So organ status is always going to be a  
3 company that is held less than 50 percent, indirectly or  
4 directly, by the government. Because if it was held more than  
5 50 percent, they're in like Flynn like Group is.

6           So here we have to consider the multifactor test, and this  
7 was discussed by the expert. There are many companies in China  
8 that are partially owned or controlled by the Chinese  
9 government. That has gone way down in the last 20 years.  
10 Maybe 20 or 30 percent of them are.

11           But the point here is that China itself and Group and  
12 Display define Irico Display as state controlled, and that is  
13 not true of most companies in China. This is a unique  
14 situation.

15           The 2007 annual report of Display says that Group is the  
16 actual controller of Display. It would do me no good nor do I  
17 have time to go through the host of ways in which Group and the  
18 government control Display, but to me it is astounding the  
19 level of control.

20           It does not provide protection for 30 percent of the  
21 Chinese economy from liability in the United States because  
22 even if they're a foreign sovereign, if they cause a direct  
23 effect in the United States, they're liable. But when the  
24 company is state controlled, it ought to be found to be an  
25 organ under the FSIA.

1 I want to move on to two --

2 **THE COURT:** I'm hoping you'll address this point  
3 about -- in the -- you know, the three subparts, the third of  
4 which is direct effect. Could you identify some conduct  
5 that -- boy, I thought I made a clearer note and now it turns  
6 out my notes aren't very good.

7 **MR. PLUNKETT:** Well, I think --

8 **THE COURT:** I'll add a minute to your time just  
9 because I'm stalling up here. Hold on.

10 (Pause in proceedings.)

11 **THE COURT:** What falls under the third prong,  
12 commercial activity, but not under the first or second? That  
13 was Mr. Rapawy's question. I thought it was a good question.

14 **MR. PLUNKETT:** Well, in a contract case, it would be  
15 somebody entering -- somebody in another country entering into  
16 a contract with someone in a U.S. company and their conduct can  
17 cause a breach of that contract. In an antitrust case, I think  
18 there could be sales that could fall under either the first or  
19 the third.

20 **THE COURT:** Mr. Levin says in a group boycott case  
21 there would never be a direct effect using your test. It  
22 wasn't a bad point. What do you think of it?

23 **MR. PLUNKETT:** Well, let me think about that. If  
24 there's a group boycott, I don't know why there couldn't be a  
25 direct effect in the United States. It's conduct. The refusal

1 would be conduct. There could be an effect in the  
2 United States. I think in that situation you'd end up with --  
3 because this is not the FTAIA --

4 **THE COURT:** Get back to Mr. Taladay's privity point  
5 maybe.

6 **MR. TALADAY:** Should I?

7 **MR. PLUNKETT:** Yeah, sure. Absolutely.

8 **MR. TALADAY:** Your Honor, to give you what I think is  
9 a pretty clear example, if I'm a seller in Mexico and you're a  
10 U.S. company, I come into the United States, I sell you a  
11 product. That is, I think, the first exception.

12 If you come to Mexico and I sell you a product to take  
13 back to the United States, I think that's the third exception.

14 But if I sell to a store in Mexico and I have no further  
15 communication or connection to the United States and Stuart  
16 decides to go into the United States and sell or sells to you  
17 to take to the United States, that's none of the exceptions,  
18 Your Honor.

19 **THE COURT:** All right.

20 **MR. PLUNKETT:** But the real issue here is if you  
21 interpret the third exception direct effects as allowing a  
22 situation where a defendant participates in a global  
23 conspiracy, raises prices, causes something here, they have no  
24 contacts with the United States, it's unconstitutional. That's  
25 the statute -- that's the statutory construction canon that

1 matters here.

2 If it's interpreted that way, it's unconstitutional  
3 because the FSIA is the sole source of jurisdiction. So it's a  
4 completely different statute than the FTAIA.

5 They cite *Sea Breeze*. It was affirmed by the  
6 Ninth Circuit. I would just encourage Your Honor to look at  
7 the footnote where this is addressed in the Ninth Circuit. It  
8 makes clear that the reason for finding a direct effect was  
9 that a contract with a U.S. entity would have been breached.  
10 It had nothing to do with the effects of a conspiracy. It  
11 doesn't support their position.

12 **THE COURT:** Can you imagine a defendant, corporate  
13 defendant, that is resident in a country with no antitrust  
14 laws -- I don't know if there is such a country, but we'll  
15 imagine that there is one -- and they participate in a  
16 conspiracy to fix prices in a global market? So that we could  
17 all agree that while there might be debates about the level of  
18 effect, prices being what they are, if the conspiracy is  
19 effective, it will affect prices everywhere.

20 And the company, as I say, is in a country that doesn't  
21 have any antitrust laws. Could they ever be sued anywhere  
22 under your theory?

23 **MR. PLUNKETT:** Well, if they have no contact with  
24 another jurisdiction, I mean, it would depend on each  
25 jurisdiction's long-arm statutes and their own rules; but in

1 the United States, if it's a foreign sovereign, the problem --  
2 they would probably trip on this direct effects argument and  
3 the need to show personal jurisdiction.

4 **THE COURT:** Right. Okay.

5 **MR. PLUNKETT:** There would probably be a need to show,  
6 as there is under any long-arm statute, especially now with  
7 *Bristol-Myers Squibb*, to show something that happened in the  
8 forum that is connected to the claim.

9 **THE COURT:** And if I go back more carefully through  
10 this reply brief, I'm going to -- I'm not going to have any  
11 trouble pulling apart the \$8 million in sales, am I? It's all  
12 laid out there like a surgeon's tool?

13 Mr. Taladay is nodding emphatically. Okay. Then I'm not  
14 going to worry about it.

15 **MR. PLUNKETT:** It is laid out there, but there's a  
16 very easy answer and it's actually what I wanted to conclude  
17 with, which is that all of the sales, every one of them, the  
18 samples, all of them, Irico (USA), all of them, everyone is  
19 CNEIECC.

20 And I don't want to be -- the reason we know that that's a  
21 problem for them is because there was one document of all the  
22 documents submitted to the Court where they said, "Hey, that's  
23 a hearsay. That's the official public record in China that  
24 shows that Group never had any ownership interest in CNEIECC."  
25 And they object to it and don't want the Court to consider it

1 because it shows there's no U.S. sales and it pushes the Court  
2 into this place where they can't win, where the only way they  
3 can win is by saying, "We participated in a conspiracy and  
4 here's some express aiming because U.S. currency is mentioned  
5 in these e-mails."

6 Those sales don't matter, but it is set forth in the reply  
7 brief why each of them doesn't matter independent of the fact  
8 that they're not our sales.

9 **THE COURT:** Very good.

10 **MR. PLUNKETT:** Thank you, Your Honor.

11 **THE COURT:** Thank you.

12 Thank you all for your very good arguments and the  
13 interesting briefing. These motions are under submission.

14 **THE CLERK:** Court is in recess.

15 (Proceedings adjourned at 3:19 p.m.)

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CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript  
from the record of proceedings in the above-entitled matter.

DATE: Wednesday, June 12, 2019

A handwritten signature in black ink, appearing to read "Jo Ann Bryce", is written over a horizontal line.

Jo Ann Bryce, CSR No. 3321, RMR, CRR, FCRR  
U.S. Court Reporter